A

# MUHAMMED YUSOFF RAWTHER v. ANWAR IBRAHIM; KETUA PENGARAH JABATAN SIASATAN JENAYAH POLIS DIRAJA MALAYSIA & ANOR (PARTIES SOUGHT TO BE DISCOVERED)

B

HIGH COURT MALAYA, KUALA LUMPUR
JOHAN LEE KIEN HOW J
[CIVIL SUIT NO: WA-22NCVC-491-07-2021]
2 MAY 2025
[2025] CLJ (JT5)

C

**Abstract** – *(i) For an application for discovery under O. 24 r. 7A of the Rules of Court 2012, mere assertion of relevancy and necessity is insufficient; a thorough and clear explanation must be provided to demonstrate how the disclosure of the documents sought would be relevant and necessary for the fair disposal of the case or to save costs;* D *(ii) Polygraph test results have no place in civil proceedings to establish credibility of witnesses as there are established alternative tools for the court and counsel to determine credibility of a witness, ie, demeanour, consistency of answers; (iii) Polygraph test results obtained during a criminal investigation, where the person undergoing the test was an* E *informant and had the understanding that the information would be treated confidentially, are considered communications made in official confidence.*

F

***CIVIL PROCEDURE:*** *Discovery – Application – Application against Royal Malaysian Police to produce polygraph test results conducted on applicant – Whether requirements of relevancy and necessity fulfilled by applicant – Whether polygraph test results applicable and could be relied on in civil proceedings – Whether documents sought to be discovered privileged under law – Rules of Court 2012, O. 24 r. 7A*

G

***EVIDENCE:*** *Privilege – Polygraph test results – Application for discovery against Royal Malaysian Police to produce polygraph test results conducted on applicant – Whether polygraph test results made in official confidence – Whether private information belonging to applicant – Whether information fit for public consumption – Whether sufficient to invoke privilege under s. 124 of Evidence Act 1950*

H

The plaintiff sought a discovery, pursuant to O. 24 r. 7A of the Rules of Court 2012 ('ROC'), against the Royal Malaysian Police, to produce polygraph test results conducted on the plaintiff. In support of his application, the plaintiff submitted that his request for discovery of the polygraph test results had fulfilled the requirements in *Billion Prima Sdn Bhd & Anor v. Nutech Company Ltd & Anor*, particularly that: (i) it was relevant

I

to the proceedings as it was a corroborative element to prove the plaintiff's case of a tort of sexual assault and/or trespass to person; (ii) it was necessary for the fair disposal of the case as its early production at this stage, *ie*, before the commencement of the trial, would facilitate the preparation for the trial and allow for better appreciation of the issues arising out of the suit; and (iii) the document sought to be discovered was not privileged as it was not specified within the Schedule to s. 2A of the Official Secrets Act 1972. The issues that arose for adjudication were: (i) whether the requirements of relevancy and necessity were fulfilled by the plaintiff; (ii) whether polygraph test results were applicable and could be relied on in civil proceedings; and (iii) whether the documents sought to be discovered were privileged under the law.

**Held (dismissing application):**

**(1)** Thorough and clear explanation must be provided within the supporting affidavit to demonstrate as to how the disclosure of the documents sought to be discovered would be relevant and necessary. Mere assertion was not enough to fulfil the requirements of relevance and necessity under O. 24 r. 7A of the ROC. The plaintiff, however, proffered no explanation as to how the polygraph test results were relevant and would have saved costs or ensured a fair disposal of the case. (paras 17, 19 & 22)

**(2)** There were several tools available for the court and counsel to determine the credibility of a witness without utilising a polygraph test. The court may analyse a witness' candour through the manner in which the answers were proffered, his demeanour when confronted with a difficult cross-examination, the consistency of answers while under fire – all of which could not be objectively decided through a polygraph test. Should the discovery of the polygraph test results be ordered, more disputes and uncertainty would naturally be created. It would also open the floodgates and establish a trend by the claimants to enlist the assistance of the police force in a civil dispute. This could not be condoned. (paras 32-34)

**(3)** The plaintiff had undergone the test as part of a criminal investigation where he was the informant and, like any informant, he would have pure knowledge that the information provided would be treated as confidential. After this communication was made, the information recorded no longer became private information belonging to the plaintiff and was subjected to laws surrounding investigations, including s. 124 of the Evidence Act 1950. It was now up to the officer concerned to determine whether the information should be disclosed or otherwise; the officer concerned was of the opinion that it was not fit for public consumption and would strongly affect public interest. This was sufficient to invoke privilege under s. 124. (para 47)

**Case(s) referred to:**

*Billion Prima Sdn Bhd & Anor v. Nutech Company Ltd & Anor [2017] 1 CLJ 179 HC* ***(refd)***

*Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors [2017] CLJU 499; [2017] 1 LNS 499 CA* ***(refd)***

*Malaysia Debt Ventures Bhd v. Platinum Techsolve Sdn Bhd & Ors [2020] CLJU 1252; [2020] 1 LNS 1252 CA* ***(refd)***

*R v. Béland & Anor [1988] LRC (Crim)* ***(refd)***

*Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC* ***(refd)***

*Tan Liong Sin v. Etiqa Insurance Bhd [2016] CLJU 413; [2016] 1 LNS 413 HC* ***(refd)***

*United States v. Scheffer 523 US 303 (1998)* ***(refd)***

*VisionHealthOne Corp Pte Ltd v. HD Holdings Pte Ltd & Other (Chan Wai Chuen & Anor) [2010] SGHC 78* ***(refd)***

**Legislation referred to:**

Evidence Act 1950, s. 124
Official Secrets Act 1972, s. 2A
Rules of Court 2012, O. 24 rr. 7A(7)(b), 8

*For the plaintiff - Haniff Khatri & Putra Alyra Narisha; M/s Haniff Khatri*
*For the defendant - Navpreet Singh & Siaw Chooi Teng; M/s Abd Halim Ushah & Assocs*
*For the parties sought to be discovered - Mohammad Al-Saifi Hashim & Safiyyah Omar; FCs*

*Reported by Najib Tamby*

## JUDGMENT

**Johan Lee Kien How J:**

### Introduction

**[1]** The plaintiff in the main action had filed a discovery application under O. 24 r. 7A of the Rules of Court 2012 ('ROC 2012') ('this application') against the parties sought to be discovered (hereinafter 'the RMP') to produce a polygraph test result conducted on the plaintiff on 17 December 2019 at the Royal Malaysian Police Headquarters in Bukit Aman by the Crimes Investigation Department (hereinafter 'the polygraph test results'). An affidavit in support of this application was affirmed by the plaintiff.

**[2]** Subsequently, the defendant filed an affidavit in reply opposing this application. The affidavit was affirmed by himself. On the same day, the RMP filed an affidavit in reply affirmed by ASP Mohd Khairul Ridzuan bin Khiruddin, the investigating officer responsible for the criminal investigation pertaining to the plaintiff's criminal case. This was then responded to in the two affidavits in reply affirmed by the plaintiff.

**[3]** As instructed by this court, the plaintiff, the defendant, and the RMP then filed in their respective written submissions and written replies. This was followed by an oral submission session before me. Briefly, the following are the parties' submissions regarding this application.

**The Plaintiff's Submissions**

**[4]** The plaintiff's submissions are premised on two key points; Firstly, The plaintiff raised a preliminary objection that the defendant has no *locus* to oppose the application in the view that an order is sought against the RMP and not the defendant himself.

**[5]** Secondly, the plaintiff claims that his request for discovery of the polygraph test results fulfilled the requirements in *Billion Prima Sdn Bhd & Anor v. Nutech Company Ltd & Anor* [2017] 1 CLJ 179; [2017] 10 MLJ 213 particularly that:

(i) it is relevant to the proceedings as it is a corroborative element to prove the plaintiff's case of a tort of sexual assault and/or trespass to person;

(ii) it is necessary for the fair disposal of the cause as its early production at this stage, *ie*, before the commencement of trial would facilitate the preparation for the trial and allow for better appreciation of the issues arising out of the suit; and

(iii) that the document sought to be discovered is not privileged because it is not specified within the Schedule to s. 2A of the Official Secrets Act 1972.

**[6]** For the first point, the plaintiff relied on the interpretation of O. 24 r. 7A of the ROC 2012 in the case decided by the High Court of Singapore in *VisionHealthOne Corp Pte Ltd v. HD Holdings Pte Ltd & Other (Chan Wai Chuen & Anor)* [2010] SGHC 78; [2010] 3 SLR 97, wherein the court held that:

> [17] The references to "the person against whom the order is made" in 24 r. 6(1), "a person who is not a party to the proceedings" in O. 24 r. 6(2) and the language employed in O. 24 r. 6(8) (in respect of inspection and production for inspection of the Ordered Documents under O. 24 rr. 10 and 11 respectively) indicate that an *order for non-party discovery is directed solely against the non-party from whom discovery is sought, ie, it is clearly envisaged that an application for non-party discovery is a matter exclusively between the applicant and the non-party respondent.* This principle applies across the board to both instances in which pre-action nonparty discovery was made by way of originating summons (see O. 24 r. 6(1)) and by way of summons in ongoing proceedings between two parties (see O. 24 r. 6(2)).
>
> (emphasis added)

**[7]** The plaintiff relies on this interpretation to espouse the lack of *locus standi* by the defendant to challenge this application. The plaintiff argues that the defendant is not a party sought to be discovered. Hence, the discovery application becomes an exclusive suit between the plaintiff and the RMP. The defendant has no business in this application.

**[8]** The plaintiff also premises that under the second consideration, namely the elements to allow a discovery application, three out of the six elements are in contention: relevancy, necessity, and privilege of the polygraph test results.

**The Defendant's And The RMP's Submissions**

**[9]** Both the defendant and the RMP argue that the plaintiff is misguided in the application of polygraph test results in Malaysia. It was submitted that not only is there a dearth of legal authority in Malaysia for reliance of polygraph test results in court, but it is also incongruent with established court procedures where several jurisdictions advocate reliance on well-established rules of evidence instead.

**[10]** The defendant contended that several other jurisdictions including Canada and the USA, ruled against the inclusion of polygraph test results. The defendant portrayed the opinion of existing rulings by these jurisdictions on polygraph test results as not being scientifically reliable and reliance derogates from well-tested rigours of trial.

**[11]** Further, the defendant submitted that the plaintiff cannot approbate and reprobate on the relevancy and necessity of the polygraph test results having previously affirmed an affidavit (encl. 20) stating that the polygraph test results was privileged information and not for public consumption. Therefore, this asserts a reasonable question on whether it is truly relevant and necessary of the plaintiff to retrieve the polygraph test results, thus, attracting the doctrine of estoppel.

**[12]** Having appraised the facts adduced by parties through affidavits and after deliberations on the submissions by all learned counsels, I find that the plaintiff has failed to raise sound arguments on the relevancy and necessity of the polygraph test results under the requirements established in *Billion Prima Sdn Bhd & Anor v. Nutech Company Ltd & Anor* [2017] 1 CLJ 179; [2017] 10 MLJ 213.

**[13]** The following are my reasoning in dismissing the plaintiff's application for the discovery of the polygraph test results.

**The Law On Discovery Against Third Parties**

**[14]** Order 24 r. 7A of the ROC 2012 has laid down the requirements for such application. In brief, the requirements as elaborated in *Billion Prima Sdn Bhd & Anor v. Nutech Company Ltd & Anor* [2017] 1 CLJ 179; [2017] 10 MLJ 213 are:

(i) the applicant's affidavit in support of the discovery application against third party has sufficiently specified or described the documents in respect of which the order is sought with reasonable precision;

(ii) the supporting affidavit shall show that the document sought are relevant to an issue arising or likely to arise from the claim made;

(iii) the supporting affidavit shall show that the person against whom the order is sought is likely to have or have had the documents in his possession, custody, or power;

(iv) the discovery application against the third party is necessary either to fairly dispose of the pending suit, or to save costs. This is to be interpreted disjunctively as it is sufficient for either one to be satisfied;

(v) the documents are not privileged, and the third party can be compelled by an order to produce the documents and not be hindered by claiming privilege under r. 7A(7)(b) of the order; and

(vi) the application and the supporting affidavit shall be served personally on the third party, and on every party in the pending suit.

**[15]** From the six requirements of *Billion Prima Sdn Bhd & Anor v. Nutech Company Ltd & Anor* [2017] 1 CLJ 179; [2017] 10 MLJ 213, three are in contention between the plaintiff and the defendant together with the RMP. I will deal the requirements of necessity and relevancy together, and the requirement of privilege later.

*Whether The Requirement Of Relevancy And Necessity Are Fulfilled By The Plaintiff*

**[16]** The plaintiff in his affidavit in support provided the following reasons as his reason as to why the polygraph test results are relevant:

(i) to aid the carrying out the discharge of the burden of proof by relying on the polygraph test results; and

(ii) the results of the polygraph test results may corroborate testimony of the plaintiff.

**[17]** No further explanation as to how it is relevant was offered by the plaintiff. In oral submissions, the same points were mentioned, and it was greatly emphasised that the polygraph test results only serves as corroborative evidence.

**[18]** Meanwhile, on the point of necessity, the plaintiff provided the following reasons:

(i) to assist this court to have better appreciation of the issues arising out of this suit;

(ii) to facilitate the parties' preparation for trial, hence saving costs and time; and

(iii) without this discovery, the plaintiff will be required to subpoena witnesses to testify, thus incurring additional costs.

**[19]** Again, no further explanation as to how producing the polygraph test results at this stage would have saved costs or ensure a fair disposal of the case was offered by the plaintiff. The only statement averred was "to avoid or reduce the necessity of subpoena witnesses". This does not provide insight or coherent reasoning that would show how the polygraph test results are necessary.

**[20]** It is trite law that relevance alone is not sufficient. It must be shown that the document is necessary. This overarching requirement is expressly provided in O. 24 r. 8 of the ROC 2012:

> On the hearing of an application for an order under rule 3, 7 or 7A, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

**[21]** In the case of *Malaysia Debt Ventures Bhd v. Platinum Techsolve Sdn Bhd & Ors* [2020] CLJU 1252; [2020] 1 LNS 1252; [2020] MLJU 1421 at p. 51, S Nantha Balan JCA has candidly held that:

> [202] In our view, the proper approach to the question of whether discovery is "necessary" may be gleaned from the case of *Bayerische Hypo- und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] SGHC 155; [2004] 4 SLR 39 ("*Bayerische*") where the High Court of Singapore at paragraph 37 stated as follows:
>
> > The ultimate test is *whether discovery is necessary for disposing fairly of the proceedings or for saving costs. An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will not be enough.*
>
> [203] Further, in paragraph [38] of the judgment, the Singapore High Court had considered Order 24 Rule 7 which is *pari materia* with our Order 24 Rule 8 and stated that:
>
> > The court is, by O. 24 r. 7, concerned with the discretion to refuse disclosure of a document unless the necessity for disclosure is clearly demonstrated.
>
> [204] As stated earlier, *the burden was on the respondents to establish to the satisfaction of the Court that the DSA is not just relevant but also that it is necessary for disposing the matter fairly and for savings of cost as well.* (emphasis added)

**[22]** It is clear that a mere assertion is not enough to fulfil the requirements of relevance and necessity under O. 24 r. 7A of the ROC 2012. Thorough and clear explanation must be provided within the supporting affidavit to demonstrate as to how the disclosure of the document sought to be discovered would be relevant and necessary.

**[23]** However, in this case, the plaintiff's supporting affidavit provided mere assertions that upon disclosure of the Polygraph Test Results, it would allow for a fair disposal of the case and saving of costs when the need to call in members of the RMP to testify in trial can be dispensed of. It is my opinion that a mere assertion such as this does not fulfil the requirements of relevance and necessity. The court needs more cogent and detailed reasons to support such a mere assertion. Hence, on this alone, this application fails the requirements under O. 24 r. 7A of the ROC 2012.

**[24]** Despite that, I am fortified – and find it interesting – that the plaintiff had, earlier on, affirmed in an older affidavit in encl. 20 stating that the polygraph test results and the information therein is irrelevant and unnecessary. In the same affidavit, the plaintiff himself also averred that this would prolong or delay the trial. This admission by the plaintiff must be duly taken notice by this court. In encl. 20, the plaintiff had averred that:

> 6. I am further advised by my solicitors and verily believe that the interrogatories application at this stage of the proceedings and/or at any stage of the proceedings herein **is neither relevant nor necessary for the fair disposal of the main suit herein and most certainly not lead to savings of cots …**
>
> 7. In relation 6 of the Defendant's AIS, I am advised by my solicitors and verily believe that the interrogatories application is not *bona fide*, **unnecessary, and a waste of the Court's time** … (emphasis added)

**[25]** The law is clear. One cannot approbate and reprobate. The plaintiff cannot blow hot and cold at the same time. The law will impose an estoppel on a party who attempts to do so. On this point, I agree with the defendant. I find authority in the decision of Idrus Harun JCA (as he then was) in the case of *Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors* [2017] CLJU 499; [2017] 1 LNS 499; [2017] 5 MLJ 63 at p. 74, lines C to D:

> It is clear to this court that the object of judicial estoppel is to prevent a party who assumes a particular position in litigation to take an inconsistent position in later litigation.

**[26]** The plaintiff did not offer any substantial rebuttals on these points other than the affidavit was affirmed for the purpose of challenging the defendant's interrogatories application at the time. Bearing in mind that interrogatories application was meant for the same polygraph test results, I do not find this explanation satisfactory to do away with this 180-degree turn in the plaintiff's position. The plaintiff cannot be allowed to change minds at his whims and fancies to suit his circumstances and thus, the judicial estoppel applies.

*Whether Polygraph Test Results Are Applicable And Can Be Relied On In Civil Proceedings*

**[27]** For completeness' sake, I will address the plaintiff's claim of utilising a polygraph test in civil cases. In the instant case, the plaintiff seeks to use the Polygraph Test Results to show and support the claim that the plaintiff was speaking truthfully.

**[28]** The plaintiff relied on two Canadian cases from the court of Quebec as supporting authority on the admissibility of polygraph test results as evidence in courts. However, I note here that this court only has the benefit of an unauthenticated translated copy of the judgment originally written in French. The plaintiff did not provide or is unable to procure an official English version of the judgment. Thus, this court must be cautious and sceptical on the accuracy of the translation as reminded by the defendant's counsel.

**[29]** Nevertheless, in the cases provided by the plaintiff, the court of Quebec – as far as the translated excerpts provide – only recognised the functions of polygraph test results and its admissibility. However, there was no guidance as to how such tests could be interpreted harmoniously with rules of evidence.

**[30]** Counsel for the defendant and the RMP both contended extensively on the danger of acceptance of polygraph test results in civil matters. Both of them referred to a different Canadian case, *R v. Béland and Another* [1988] LRC (Crim) and a United States case, *United States v. Scheffer* 523 US 303 (1998) where the decision of both jurisdictions' Supreme Courts admonished the polygraph test as a tool to test the credibility of witnesses due to the inaccuracy of polygraph test results and its disharmony with rules of evidence.

**[31]** I am agreeable with the defendant and the RMP that polygraph test results have no applicability in civil cases. The case of *Tan Liong Sin v. Etiqa Insurance Bhd* [2016] CLJU 413; [2016] 1 LNS 413 illustrates how polygraph test results are ineffective as compared to rules of evidence. In this case, based on the polygraph test results, the respondent filed a claim against the appellant for an allegation of fraud due to the appellant's insurance claim arising out of a policy covering incidents of robber. The appellant claimed to have been a victim of such incident and had utilised the coverage. The trial judge found that the detailed and organised manner of the appellant's narrations of the robbery during trial raised doubts and suspicion as to the credibility of the appellant. Further, the appellant was unable to recall important details such as the name of the investigating officer and the man who assisted him. Additional unproven claims such as excessive claims to vehicle ownership were found to be indicators of further credibility issues. For those reasons, on appeal, the court maintained the trial judge's findings concerning credibility.

**[32]** To my mind, there are several tools available for the court and counsels to determine credibility of a witness without utilising a polygraph test. The court may analyse a witness's candour through the manner in which the answers were proffered, his demeanour when confronted with a difficult cross-examination, the consistency of answers while under fire – all of which cannot be objectively decided through a polygraph test. *Tan Liong Sin v. Etiqa Insurance Bhd* [2016] CLJU 413; [2016] 1 LNS 413 has clearly demonstrated that rules of evidence are more relevant and handier in assisting the court in determining the credibility of a witness, without having to resort to a polygraph test result.

**[33]** Be that as it may, it is also my finding that should the discovery of the polygraph test results be ordered, more disputes and uncertainty would naturally be created.

**[34]** Above all, I agree with the RMP that it would also open the floodgate and establish a trend by claimants to enlist the assistance of the police force in a civil dispute. This cannot be condoned.

**[35]** The RMP is not a mechanism for the public to resolve civil disputes despite the misconception from the public on their powers and authority. It is a law enforcement agency tasked with the utmost duty of the protection of the public and empowered with legal authority to investigate criminal activities. Their tools and means of disposal such as polygraph tests are not meant for the public or any other person to use for their sole and personal benefit. It is, instead, meant for criminal investigations to put forth the best case. If this court were to order for the discover of the polygraph test results through this application, this court is indeed opening the floodgates. The police will undoubtedly be buried in tremendous requests from the public to conduct polygraph tests so that claimants at large can use the test results to establish their cases and to enhance their credibility. This, in turn, takes away precious man-hours from the RMP to perform their core mandate.

*Whether The Documents Are Privileged Under The Law*

**[36]** Another issue that needs to be dealt with by this court is the argument whether the documented sought to be discovered is privileged. On this issue, the dispute lies within the interpretation of s. 124 of the Evidence Act 1950, which is reproduced as follows:

> No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure:
>
> Provided that the court may require the head of the department of the officer to certify in writing whether or not such disclosure would be detrimental to the public interest and, if the head of the department certifies that such disclosure would not be prejudicial to the public interest, then the officer shall disclose the communications.

**[37]** The plaintiff argues that the polygraph test results simply is not a privileged document as it does not fall within the definition of s. 124 of the Evidence Act as it does not fulfil the condition precedent of a certification in writing whether such disclosure would be detrimental to public interest, nor does it fall under the definitions provided within s. 2A of the Official Secrets Act 1972.

**[38]** At the outset, I must mention that I agree with the plaintiff's contention that the polygraph test results does not fall within the Official Secrets Act 1972. There is nothing in the Act remotely suggesting this notion.

**[39]** Meanwhile, the RMP submitted that the polygraph test results falls within the ambit of s. 124 of the Evidence Act as it is connected to the investigation conducted by the police in the course of their official duties, and thus, was made in confidence.

**[40]** The RMP placed a strong reliance on the leading authority of Ahmad Maarop FCJ (later CJM) in the case of *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733 at para. 39:

> Under s. 124 of the Evidence Act 1950, only communications made to public officer in official confidence are privileged. *Any communication which is treated as confidential and made to a public officer under an honest and bona fide belief that he would keep the contents of or the information contained in such communication confidential without disclosing the same to others would come within the ambit of s. 124.* It is settled that s. 124 of the Evidence Act 1950 includes not only communications made in official confidence by one public officer to another, but also communications made in official confidence by private person to a public officer. (emphasis added)

**[41]** Further, in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733, the Federal Court also emphasised on the importance of non-disclosure of documents or information on public interest for the effective functioning of departments or organs of central government, as follows:

> [42] On the effective functioning of departments or organs of central government as a ground of non-disclosure of documents or information on public interest, in *D v. National Society for the Prevention of Cruelty to Children*, Lord Diplock said at pp 220-221:
>
> > I see no reason and I know of no authority for confining public interest as a ground for non-disclosure of documents or information to the effective functioning of departments or organs of central government. In *Conway v. Rimmer* [1968] AC 910 the public interest to be protected was the effective functioning of a county police force; in *In re D (Infants)* [1970] 1 WLR 599 the interest to be protected was the effective functioning of a local authority in relation to the welfare of boarded-out children. In the instant case the public interest to be protected is the effective functioning of an organisation authorised under an Act of

> Parliament to bring legal proceedings for the welfare of children. I agree with Croom-Johnson J. that this is a public interest which the court is entitled to take into consideration in deciding whether the identity of the NSPCC's informants ought to be disclosed. I also agree that the balance of public interest falls on the side of non-disclosure.
>
> [43] The additional fact that to break the seal of confidentiality would endanger public interest, will in most cases probably lead to the conclusion that disclosure would be withheld. In this regard, in *D v. National Society for the Prevention of Cruelty to Children Lord Edmund Davies* said at p 246:
>
> > (v) The mere fact that relevant information was communicated in confidence does not necessary mean that it need not be disclosed. But where the subject matter is clearly of public interest, the additional fact (if such it be) that to break the seal of confidentiality would endanger that interest will in most (if not all) cases probably lead to the conclusion that disclosure should be withheld. And it is difficult to conceive of any judicial discretion to exclude relevant and necessary evidence save in respect of confidential information communicated in a confidential relationship. (emphasis added)

**[42]** RMP premised that, to which I agree, the principle pertaining to official communication under s. 124 of Act 56 in the above case is relevant to our case. The document sought by the plaintiff which is the polygraph test report is connected to the investigation conducted by the police in the course of their official duties and that the communications were made in confidence.

**[43]** With that in mind, I refer to the test mentioned in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733 at [48]:

> Reverting to the present appeal, the issue we have to consider is whether the privilege under s. 124 of the Evidence Act 1950 is applicable? Applying the law which we have just set out, in considering this pivotal issue, the court would have first to determine whether the communication in question had been made to a public officer in official confidence. If the answer is in the negative, then the s. 134 statements will have to be disclosed. If the answer is in the affirmative, then it is for the officer concern to decide whether the statements should be disclosed or not?

**[44]** The key issue whether the privilege under s. 124 is applicable would only be answerable by a two-fold test: whether the communication in question had been made to a public officer in official confidence, and if the answer to the first query is in the positive, then, the court will have to determine whether the statement should be disclosed. Toward this end, the court will have to rely on the investigating officer to assist the court in arriving at the answer whether the information should be disclosed.

**[45]** In his affidavit, ASP Mohd Khairul Ridzuan bin Khiruddin, the investigating officer responsible for the criminal investigation pertaining to the plaintiff's criminal case had already averred that the polygraph test results were part of investigation papers and therefore, not fit for public consumption. It was also averred that should this court allow disclosure of a document in the investigation paper; it will have direct impediment to any future criminal investigation as it will open a floodgate for disclosure in any future civil action.

**[46]** I am therefore satisfied that the polygraph test results were made in official confidence. The plaintiff had undergone the test as part of a criminal investigation where he was the informant, and like any informant, he would have pure knowledge that the information provided would be treated as confidential. After this communication was made, the information recorded no longer becomes private information belonging to the plaintiff and is subjected to laws surrounding investigations including s. 124 of the Evidence Act.

**[47]** Hence, it is now up to the officer concerned, in this case ASP Mohd Khairul Ridzuan bin Khiruddin, to determine whether the information should be disclosed or otherwise. As mentioned earlier, he was of the opinion that that it was not fit for public consumption and would strongly affect public interest. This, for all intents and purposes, is sufficient to invoke privilege under s. 124 of the Evidence Act.

**[48]** Interestingly, in encl. 20, the plaintiff himself had quoted former Inspector-General of Police in an article in relation to the polygraph test results as his support that the polygraph test reports are unfit for public consumption.

**[49]** It is further damning that in the same (older) affidavit, the plaintiff agreed that the polygraph test results are privileged information and are not fit for public consumption. No further explanation as to whether it is privileged information is discussed further along this judgment. Nevertheless, it cannot be ignored and dismissed that the plaintiff's view concerning the point was that the polygraph tests were privileged information when he averred (in encl. 20) that:

> 8. In addition to the above, I am advised by my solicitors and verily believe that **the results of a lie detector test/Polygraph Test Results are privileged information, which is only within the knowledge, possession, and/or control of the Royal Malaysia Police and is not for public consumption.**
> (emphasis added)

**[50]** As mentioned earlier, the plaintiff did not offer any substantial rebuttals on these points. I do not find any satisfactory explanation tendered to do away with this 180-degree turn in the plaintiff's position. Again, the plaintiff cannot be allowed to change minds at his whims and fancies to suit his circumstances and thus, the judicial estoppel applies.

**[51]** Therefore, there is without a shadow of a doubt that the plaintiff did not have concrete reasons as to relevance – what more necessary – to satisfy the discovery threshold.

**[52]** For this reason, I find that the polygraph test results are privileged from disclosure under s. 124 of the Evidence Act 1950.

## Conclusion

**[53]** As established, the plaintiff has failed to satisfy the requirements of relevancy and necessity without further reasoning and elaboration. Mere assertion is insufficient to convince the court. The plaintiff also stumbled at the issue of privilege where I find that the polygraph test results are subjected to the exclusion of disclosure under s. 124 of the Evidence Act 1950.

**[54]** Further, I find that polygraph test results have no place in civil cases to establish the credibility of witnesses in the face of the law of evidence and robust cross-examination. The issue of accuracy of the polygraph test results is heavily debated in many jurisdictions and scientific journals. This court is unable to rely on or put weight on unreliable metrics. Further, allowing such tests to be used in civil proceedings would also open the floodgate and establish a trend by the claimants to enlist the assistance of the police force in civil disputes.

**[55]** For the above reasons, I dismiss the plaintiff's application.